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No.

Supreme Court, U.S.
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In The Supreme Court of the United States
Spring Term, 1986

John J. Scinto, Petitioner Pro Se

v.

Maurice J. Sponzo, Judge
Chief Administrator, representing
The Judges of the Superior Court of Connecticut
and
R. David Stamm, Administrative Director of/and
The Connecticut Bar Examining Committee,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Respectfully submitted

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. Whether a 42 U.S.C. 1983 deprivation by state court agents preventing Plaintiff Pro Se from filing for a hearing on his bar examination satisfies the exhaustion of remedies doctrine including the requirement of a Connecticut Superior Court final determination on Plaintiff Pro Se's bar examination, thus giving this Court jurisdiction for review of the examination.

II. Whether the above 42 U.S.C. 1983 deprivation gives the United States District Court jurisdiction, and thus gives appellate jurisdiction to the United States Court of Appeals, and further gives certiorari jurisdiction to this Court.

IIIa. Whether there is United States District Court jurisdiction to review the state bar examinations of an individual alleging that he was arbitrarily graded and failed

on two examinations in the same state.

III.b. Whether there is United States District Court jurisdiction to review a state bar examination of an individual alleging that he was arbitrarily grossly misgraded, by 20% or more on an essay examination.

IV.a. Whether the United States Court of Appeals for the Second Circuit has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, since it failed to grant appeals from a United States District Court's refusal to rule on a motion for summary judgment combined with a motion for permanent injuction.

IV.b. Whether there is a conflict between the decisions of the United States Court of Appeals for the Second Circuit granting appeals under 28 U.S.C. 1292(a)(1) for the denial of a motion for summary judgment

coupled with a motion for permanent injunction, and the decisions of the Third and Sixth Circuits denying such appeals, which conflict should now be decided by this Court.

V. Whether the United States Court of Appeals has so far departed from the accepted and usual course , etc., since it failed to find that two or more non-final orders may be joined to give the effect of finality, thus becoming appealeable.

VI. Whether the conflict of Rule 12(h)(3), F.R.C.P. (allowing an appeal's dismissal for lack of subject matter jurisdiction) with Rule 12(g) (barring a defendant from additional defences not made in his motion to dismiss) should be decided by this Court.

VII. Whether the Court of Appeals' failure to grant Plaintiff's motion for summary judgment with supporting affidavit and evi-

dence; and without countervailing evidence from Defendants who had been granted a motion to submit a (second) brief long after due date and which motion asked to address the merits, but again resulted in their failure to submit countervailing evidence, was a departure, etc.

VIII.a. Whether the Court of Appeals has so far departed, etc., in not striking Defendants' amended motion to dismiss of May 1, 1984 since Defendants waived the defense of lack of personal jurisdiction by failing to allege it in their F.R.C.P. Rule 12 motion to dismiss.

VIII.b. Whether the Court of Appeals has so far departed, etc., in not striking Defendants' amended motion to dismiss of May 1, 1984 since Defendants attempted to addthe defense of judicial immunity against damages though damages had been alleged as

early as the complaint of November 15, 1983.

VIII.c. Whether the Court of Appeals has so far departed, etc., in failing to grant an appeal of a United States District Court refusal to rule on a Plaintiff's motion for summary judgment alleging grossly arbitrary methods of grading Plaintiff's bar examinations.

IX.a. Whether the Court of Appeals has so far departed, etc., in failing to grant an appealof a United States District Court scheduling order which allowed an impermissible amended motion to dismiss to address a so-called " third amended complaint " (which was really a copy of the original complaint).

IX.b. Whether the Court of Appeals so departed, etc., in failing to grant an appeal since the United States District Court Judge changed a scheduling order granting oral argument on a motion to dismiss Plaintiff's

bar examination in effect, to oral argument if in her discretion it would be helpful.

IX.c. Whether Ct. of Appeals so far departed, etc., in failing to recognize that Plaintiff was appealing not just the scheduling order , but the District Court Judge's refusal to rule on Plaintiff's amended complaint including its motion for summary judgment, motion to convert motion to dismiss to motion for summary judgment, memorandum in support of motion for summary judgment, and motion for discovery.

X. Whether the Court of Appeals has so far departed, etc., in failing to accept jurisdiction though Defendants had made pleading admissions of jurisdiction.

XI. Whether the Court of Appeals has so far departed, etc., in failing to recognize and grant Plaintiff's motion for summary judgment made in his appeals and

in his appellate brief in memorandum form, or his motion to convert the motion to dismiss to a motion for summary judgment, though Plaintiff submitted external evidence, and though Defendants never submitted any countervailing evidence, and though there was no genuine issue of a material fact.

XII.a. Whether the Court of Appeals has so far departed, etc., in denying Plaintiff's reply brief to which he had a right, because Defendants had effectively submitted their brief on November 13, 1985 though it was captioned a motion to dismiss a F.R.A.P. Rule 4(a) Appeal and (Defendants') memorandum of support, and though it admitted allof Plaintiff's grounds of appellate jurisdiction under his appeal as of right pursuant to Rule 4(a).

XII.b. Whether the Court of Appeals has so far departed , etc., in denying Plain-

tiff's motion for extension of time to file a reply brief, though granting Defs. such an extension, and though Defendants' late brief filed January 8, 1986 made pleading admissions of jurisdiction as to Plaintiff's motion for summary judgment and other pleadings and appeal grounds.

XIII. Whether the Court of Appeals has so far departed, etc., in granting Defendants' motion for extension of time to file a (second) brief (to January 10, 1986) despite the following facts: despite Defendants' failure to state reasons amounting to good cause; despite Plaintiff's mailing his opposition well before the grant of extended time; despite Defendants' having asked until January 6, 1986 but not filing the brief until January 8, 1986; and despite that brief's being effectively a second brief.

XIV.a. Whether a conflict with applicable

decisions of this Court arose when the Court of Appeals, without giving a reason, denied Plaintiff's response of December 6, 1985 to Defendants' reply.

XIV.b. Whether a conflict with a decision of the Sixth Circuit also arose when the Court of Appeals, without giving a reason, denied Plaintiff's response of December 6, 1985 to Defendants' reply.

XV. Whether the Court of Appeals so far departed, etc., in dismissing the case at bar since an unfair timing sequence from disrupted holiday mail service resulted in the dismissal being filed without consideration of Plaintiff's response in opposition to Defendants' motion for leave to file brief (of December 31, 1985) or Plaintiff's reply brief (of December 6, 1985).

XVI.a. Whether the Court of Appeals so far departed, etc., in denying Plaintiff's

suggestion for correction of the record dated November 1, 1985, and a second such suggestion dated November 27, 1985, and in refusing to accept a copy of his motion for supplemental record made to the United States District Court on January 13, 1986; thus allowing three relevant items to remain out of the record.

XVI.b. Whether the Court of Appeals so far departed, etc., in refusing to accept a copy of Plaintiff's motion for supplemental record made to the United States District Court on January 13, 1986, since this resulted in another thirty items being omitted from the index of the record on appeal, though they are physically in the record file.

XVII. Whether the Court of Appeals so far departed, etc., in dismissing this case for lack of subject matter jurisdiction over a scheduling order under 28 U.S. 1292(a)(1),

though Defendants effectively admitted subject matter jurisdiction in their pleadings.

XVIII. Whether the Court of Appeals so far departed, etc., in dismissing Plaintiff's appeals though most of the cited cases in Defendants' (second) brief are substantially distinguishable from the case at bar.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit entered in the above cause, sub nom in the matter of:

John J. Scinto, Petitioner Pro Se

v.

Maurice J. Sponzo, Judge
Chief Administrator, representing
The Judges of the Superior Court of Connecticut
and
R. David Stamm, Adminstrative Director of/and The Connecticut
Bar Examining Committee,
Respondent.

QUESTIONS PRESENTED FOR REVIEW

There are several questions. They may be found at the foremost part of the Arguments.

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STATEMENT OF THE CASE

John Scinto, Plaintiff Pro Se, and a citizen of the United States, attempted to file for a hearing on his bar examination in the Superior Court, Fairfield Judicial District in Connecticut. He was obstructed from doing so, and thus unconstitutionally deprived under 48 U.S.C. 1983 by the actions of court agents and a principal-judge under color of state law. He tried thirteen times without success to get his complaint filed, but was refused.

The Defendants admitted this jurisdictional right of a bar examination hearing in Superior Court, in their memorandum in support of motion to dismiss filed 9/13/83. After a state decision on his bar examination, an examinee may petition the United States Supreme Court for a writ of certiorari review. Welch v. Smith, 486F. Supp. 153; (1980). Schware v. Bd. of Bar Ex. of N.M., 353 U.S. 232; 1957. This deprivation was further effected because the Superior Court never fails to file a complaint brought in. Furthermore, it gives parties written instructions on corrections of pleadings, but failed to do so for me.

Furthermore the Bar Examining Committee Chairman wrote the Plaintiff that he knew of no formal hearing procedure, whereas later the Defendants admitted to one by its Welch v. Smith citation.

Moreover the Committee Administrator told Plaintiff that the only way to get a hearing was to sue the Committee in Superior Court. That is what Plaintiff attempted to do. In addition, notice of these hearing rights is inadequate, if it exists at all.

Plaintiff then filed with the United States District Court for the District of Connecticut on July 28, 1986 a motion for an injunction and temporary restraining order to preserve materials of said bar examination, leaving there his complaint addressed to the Superior Court. The next day Defendants agreed to preserve these materials, and the Judge then denied the motion as moot.

Defendants then tardily filed a motion for extension of time twenty-one days afte being served. On September 13, 1983 they filed a motion to dismiss and a memorandum in support of the motion to dismiss. The motion to dismiss specified only Rules 12 (b) (1) and 12 (b) (6) of the Federal Rules of Civil Procedure. The 12 (b) (1) argument was further qualified in that it alleged that Plaintiff had failed to exhaust his administrative rememdies. However, once is enough. Plaintiff had tried one Superior Court, and was not required to try another district Superior Court despite the fact that no one may ever have passed that way as Defendants said. However, this runs counter, to the futility doctrine. City Bank Farmers Trust Co. v. Schnader; 291 U.S. 24 (1934). Wolff v. Selective Service Bd. 16; 372 F. 2d 817 (2d Cir. 1967).

After a granted extension of time Plaintiff filed an original complaint on November 15, 1983 in longhand. It was called an amended complaint in error because of the confusion over the complaint of July 26, 1983 directed to but turned away by the Superior Court. Then, on April 6, 1984, Plaintiff filed a typed verbatim copy of the original complaint of November 15, 1983, this time serving the Superior Court Judges of Connecticut on the advice of Defendants counsel, since he was not sure he would represent them though he had done so for several years. The typed verbatim copy had a ministerial change in it naming the Superior Court Judges as opposed to the Superior Court of the Fairfield Judicial Districut previously. The change was only ministerial because the previous service upon one principal is service upon all principals.

On May 1, 1984 Defandants filed an amended motion to dismiss alleging that the Defendant Bar Examining Committee is not a "person" under 28 U.S.C. 1983, and that there is judicial immunity from money damages. I submit that this was a nullity since the previous F.R.C.P. Rule 12 motion to dismiss could not be amended this way since it waived such an amendment. I made this argument previously in the United States Circuit Court of Appeals for the 2nd Circuit in an opposition response, and in a reply brief.

On October 25, 1984, Plaintiff commenced Discovery. Shortly thereafter he wrote Defendants sending a proposed stipulated agreement on discovery which defendants essentially refused. A status conference was held on January 2, 1985 and a protective order and scheduling order were filed on January 4, 1985. Defendants then agreed in their letter of January 31, 1985 to permit Plaintiff an amended complaint in exchange for Plaintiff agreement not to object to an extension of time during which the parties would attempt to negotiate a settlement.

Plaintiff sought a passing grade on either his examintion of February 1983 or February 1984, that being his tenth attempt at the Connecticut bar examination. The negotiations proved fruitless.

Plaintiff then submitted a motion to convert the motion to dismiss to a plaintiff's motion for summary judgment, a motion to amend complaint, an amended complaint, and several supporting memoranda of law and exhibits of evidence including his affidavits on June 13, 1985. The amended complaint had the same theory as that of November 15, 1983 but added the February 1984 Bar examination under pendent jurisdiction. However, it was much more in conformity with the technical pleading rules on complaints, I submit.

Defendants moved for and were granted an extension of time to submit objections to the amended complaint, the motion to convert the motion to dismiss into a plaintiff's motion for summary judement, and other motions and filings of June 13, 1985

Plaintiff then filed a motion for default judgment, motion for discovery, and a motion for scheduling conference agenda on July 23, 1985 just prior to the conference. The Judge and Defendants counsel read them.

Then a scheduling order was filed on July 29, 1985 directing the parties to address the Defendants' amended motion to dismiss Plaintiff's so-called "3rd Amended Complaint" which had been filed on April 6, 1984. This scheduling order was different in several respects from its predecessor filed on

January 4, 1985.

Plaintiff then filed a premissive appeal on August 26, 1985, and an appeal as of right on August 28th, and two additional appeal grounds on August 30th.

A dismissal of the appeal of right was filed on January 13, 1986 stating that a scheduling order cannot be appealed. The notice was mailed on January 16th and received on January 21st. Plaintiff first got notice of it on January 17th in Appellate Court. Since Plaintiff was appealing much more that just the scheduling order, he petitioned to this Court.

ARGUMENT I

Agents of the Superior Court of the Fairfield Judicial District obstructed and deprived the Plaintiff from filing a petition for a hearing to review his February 1983 bar examination. Since Plaintiff was thus deprived of his exhaustion of remedies this Court had immediate jurisdiction to review Plaintiff's examination. In cases where the exhaustion of remedies is not deprived, this Court has final review jurisdiction by writ of certiorari. Plaintiff, however, went to the United States District Court for relief under 42 U.S.C. 1983. This should not be considered an election of remedies barring review in this Court, and this Court should review Plaintiff's examinations. Defendants admit this jurisdiction in citing Welch v. Smith, supra.

ARGUMENT II

The United States Court of Appeals for the 2nd Circuit has refused to decide my motion for summary judgment made to that Court, thus it refuses to decide an important new question of federal law. That question is whether there is federal jurisdiction over an individual alleging a 42 U.S.C. 1983 discrimination by agents of a state court obstructing his filing a complaint for a bar examination hearing, and thus whether there is resultant jurisdiction over regrading an arbitrarily graded individual bar examination.

I submit that "individual, incidental inequality" was improperly alleged as a defense since Plaintiff was not treated the same as everyone else in the class of examinees. Martin v. Walton, 368 U.S. 25 (1961); Whitfield v. Board of Examiners, 504 F 2d 474, 476 (1974); Phelps v. Bd. Ed. of N.Y., 300 U.S. 319, 324 (1936); Tang v. Appell. Div. N.Y. Supreme Ct., 487 F. 2d 141 (Cir. 2, 1973); Suffling v. Bondurant, 33 F. Supp. 257 (N.M., 1972); Steier v. N.Y. St. Ed. Couns., 271 F 2d 23 (Cir. 2, 1959).

Richardson v. McFadden, 540 F 2d 744 (1976) decided that there is federal jurisdiction under 42 U.S.C. 1983 discriminatory and arbitrary grading because of race to review and compare grade configurations and examiners' notes on individual plaintiff examinees with those of passing examinees, and to pass an individual if warranted. The rehearing decided that the comparisons were allowable, but that passing was not warrented on these two particular examinations. I submit that this Court should now logically extend this holding to include a review of the answers per se. This is an important new federal question which should be decided by this Court. Schware v. Bd. Bar Ex., 353 U.S. 232, 1957; App. of Paterson, Alaska, 459 P. 2d 703, 1969.

ARGUMENT III

The Appellate Court refused to decide whether there was federal jurisdiction of state bar examinations of an individual claiming to have been arbitrarily graded and failed on two examinations in the same jurisdiction. Furthermore, it refused to decide whether there was federal jurisdiction to decide whether Plaintiff had been grossly misgraded, by 20% on one essay examination. Gibson v. Berryhill, 411 U.S. 564 (1973; Goldsmith v. U.S. Bd. Tx. Appeals, 270 U.S. 117 (1926); Tyler v. Vickery, 517 F. 2d 1089, 1104, 1975; Richardson v. McFadden, supra; Staley v. State Bar, 17 Cal. 2d 119, 121; Chaney v. State Bar Cal., 386 F 2d 962, 1967.

ARGUMENT IV

The Appellate Court has departed from its decision in Federal Glass v. Loshin, 217 F 2d 936 (Cir. 2, 1954) and its related case in refusing to decide my case in accord with it. Raylite Elec. Corp. v. Norma Elec. Corp., 170 F 2d 914, (Cir. 2, 1948); Hood v Bd. of Trustees, 232 F 2d 626 (Cir. 4, 1956), cert. den. 352 U.S. 870 (1956). There is also a conflict between this decision and Morgenstern Chem. Co. v. Shering Corp., 181 F 2d 160 (Cir. 3, 1950); Airstream Trailers, Inc. v. Cayo, 284 F 2d 455 (Cir. 6, 1960 . This conflict should now be decided by this Court.

Fed. Glass holds that a motion for summary judgment combined with a motion for permanent injunction is appealable under 28 U.S.C. and 1292 (a) (1). Morgenstern holds that it is not.

An order is even appealable under 1292 (a) (1) without regard to its finality. Pang-Tsu Mow v. Rep. China, 201 F. 2d 195 (D.C. Cir. 1952), cert. den. 345 U.S. 925 (1953).

Fed. Glass further held that it made no difference whether you were asking for a temporary injunction or a permanent injunction, either way an interlocutory appeal must be allowed.

ARGUMENT V

The Appellate Court departed from its usual procedure in failing to follow its decision in the Staggers v. Gerdau Co., 359 F. 2d 292, (Cir. 2, 1966), a section 1291 case whose rationale applies to section 1292 (a) (1) also. Two non final orders, when joined had the effect of finality. In my case, the combination of several orders, and refusals to rule resulted in the same effect. U.S. v. Gen. Motors, 323 U.S. 373,1945; Gillespie v. U.S. Steel Corp., 321 F. 2d 518, (Cir. 6, 1964), aff. 379 U.S. 148, 1964; Stell v. Savannah - Chatham Cty. Bd. Ed., 318 F. 2d 425, (Cir. Ga. 1963).

ARGUMENT VI

The Appellate Court in the case at bar has decided that it can dismiss an appeal under 12 h (3), F.R.C.P. for lack of subject matter jurisdiction, though this order to dismiss conflicts with Rule 12 (g) which requires a defendant using a Rule 12 motion to dismiss to state all defenses and objections at once, and bars defendant from making later defenses or objections. This conflict of rules should be decided by this Court.

ARGUMENT VII

A motion for summary judgment without a hearing may be granted if hearing is waived by the party opponent. Bagley v U.S., 199 F 2d 233 (Cir. 8, 1952); U.S. V. Fisher-Otis, 496 F. 2d 1146 (Cir. 10, 1974); Season-All Ind. v. Turkiye & Seaply Glass Co., 425 F. 2d 34 (Cir. 3, 1970).

The Defendants did not request an oral hearing on my motion for summary judgment, therefore, they waived it. If a motion for summary judgment is granted without a hearing it must be because jurisdiction is at least not clearly lacking. In my case the jurisdiction is obvious I submit.

Furthermore, if there is no genuine issue of fact, the motion for summary judgment is required to be granted. Clare v. Farrell, 70 Fed. Supp., 276, D.C. Minn.

The same rationale of allowing a summary judgment on the merits when there is overwhelming evidence applies to a motion to convert motion to dismiss to plaintiff's motion for summary judgment under 12 (b) (6), F.R.C.P. The conversion is required. Carter v. Stanton, 405 U.S. 669 (1972); Dyer v. MacDougall, 201 F 2d 265 (Cir. 2, 1952). Also, an uncontested affidavit is sufficient support to grant a summary judgment. Madison v. Deseret Livestock Co., 574 F. 2d 1027, (Cir. 10, 1978). This is especially true when defendants have submitted no countervailing evidence, even after they specifically moved for an additional brief in Appellate Court to address the merits, which brief was allowed by motion made out of time, and filed

39 days after due date. That brief was filed after Plaintiff had made a motion for summary judgment to Appellate Court in his appeals, and in his brief in memorandum form mailed Oct. 30, 1985 in accord with oral instructions from an Appellate Court Clerk's Assistant.

The Appellate Court's failure to grant such a motion for summary judgement, or to require it to be considered or heard before Defendants' motion to dismiss was a departure so far from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Samara v. U.S., 129 F. 2d 594, (Cir. 2, 1942); cert. den. 317 U.S. 686; Boro Hall v. G. M. Corp., 174 F. 2d 832 (Cir. 2, 1942); cert. den. 317 U.S. 695.

ARGUMENT VIII

Defendants admitted jurisdiction in the United States District Court for the District of Connecticut to the extent that they did not deny it by their qualified motion to dismiss and memorandum in support of motion to dismiss. They so qualified it by allegations of failure to exhaust administrative remedies, abstention, and failure to state a claim. Failure to exhaust administrative remedies is a question of fact which cannot be decided by a motion to dismiss, and therefore it should be stricken as a defense, I submit.

Later defendants attempted to amend their motion to dismiss adding allegations that a Bar Examining Committee is not a person under 42 U.S.C. 1983, and that there is judicial immunity as to damages. However, a F.R.C.P. Rule 12 defense waives objections to personal jurisdiction, and the argument of judicial immunity as to damages is late since Plaintiff asked for damages in his original complaint of Nov. 15, 1983; and since damages are always at issue. Furthermore, the same principle against adding a lack of personal jurisdiction defense pertains to later memoranda of law at the appellate level.

Plaintiff met these two allegations by submitting two affidavits and 25 exhibits of evidence in support of his allegation that he attempted to exhaust his administrative remedies in

Superior Court, but was thwarted and deprived under 42 U.S.C. 1983 from doing so. Therefore, the futility doctrine precludes the need for him to apply to another district of the Superior Court.

Plaintiff tried 8 times with the Deputy Clerk in question, in the Superior Court, twice with the Judge, and 3 times with the Chief Clerk to have his complaint and motion for temporary injunction and restraining order (re materials) accepted. All refused though the requirements of the Court are to accept all court papers for filing.

Furthermore, the Chairman of the Bar Examining Committee had written Plaintiff stating that there was no formal hearing process he knew of, though there actually was one, as admitted in defendants' memorandum in support of motion to dismiss of 9/13/83. This argument has already been completed in the Statement of this case. The first part of the 48 U.S.C. 1983 deprivation was the obstruction of his Superior Court complaint. The second part comes from arbitrary and capricious methods used to grade Plaintiff's two bar examinations which he claims he passed.

The test purports to test minimum competency, but the examiners were not allowed to give such a grade equivalent on any essay question.

Other arbitrary grading methods were used as delineated in plaintiff's memorandum in support of motion for summary judgment filed July 13, 1985. Plaintiff submits that his essay examination of February 1983 obviously deserved a much higher grade than it received. On the February 1984 examination he claims he deserved only about 1 point more on the essays (he needed only 3/4 of a point more than received to pass).

Arbitrary methods resulted in 20% to 100% scoring differences between two different graders on the same answer written by Plaintiff. This happened on several essay answers on the February 1983 examination, but not as often on the February 1984 examination.

Another arbitrary method forced the two examiners to agree on a score on each essay question no matter how far apart their scores were. Schware v. Bd. Bar Ex. of N.M., 353 U.S. 232, 1957; Richardson v. McFadden, supra; Gibson v. Berryhill, supra; Yick Wo v. Hopkins, 118 U.S. 356, 1886.

ARGUMENT IX

The scheduling order of 7/29/85 was an abuse of discretion by the U.S. District Court Judge since it required an amended motion to dismiss (which was a nullity I submit) to address a so called "3rd Amended Complaint" filed April 6, 1984 (which incorrectly labeled by a clerk's assistant though I asked her not to). That complaint was a verbatim copy of the original complaint of Nov. 15, 1985 except for the ministerial change of changing the caption of one of the parties.

Defendants failed to answer the original complaint of November 15, 1983 or the amended complaint of June 13, 1985, despite the fact that both were sufficiently clear enough to understand. Therefore, the denial of Plaintiff's motion for default judgment on 8/3/85 was an abuse of discretion, I submit. Allis - Chalmers Corp. v. Phil. El. Co., 521 F. 2d 360 (Cir. 3, 1975).

Furthermore, service of this typed verbatim copy (of the original complaint to the United States District Court) upon the representative of all the Superior Court Judges was effected on 4/6/84 on the advice of defendants' counsel as previously explained. For the above reasons that "3rd Amended Complaint" should not have been so labeled or considered, and it should not have been scheduled for treatment in the July 29, 1985 scheduling order. The Amended Complaint and the motion to convert the motion to dismiss to a plaintiff's motion for summary judgment, and the related filings - all of 6/13/85 should have been granted quickly, I submit. Therefore, I submit that the aforementioned scheduling order was made by an abuse of discretion. U.S. v Lynd, 301 F. 2d 818, (C.A. Miss., 1962); Bothwell v. Fitzgerald, 219 F. 408, Idaho, 1915.

Moreover, the courts are loathe to grant a motion to dismiss.

Furthermore, changing the scheduling order of Jan. 4, 1985 which granted Plaintiff oral argument on the motion to dismiss, i.e., changing it to oral argument at the court's discretion thereby conditioned Plaintiff's bar examination hearing right. This was contrary to the 5th and 14th Amendments to the U.S. Constitution. Plaintiff has a right to a bar examination hearing in federal court because he was deprived of it in a Superior Court.

The Appellate Court failed to consider this question, thus departing from accepted procedure and requiring this Court's supervision. The Appellate Court also apparently failed to recognize that Plaintiff was appealing not just the scheduling order, but the District Court Judge's refusals to rule on Plaintiff's Amended Complaint, including its motion for summary judgment, motion to convert motion to dismiss to motion for summary judgment, memorandum in support of motion for summary judgment, motion for discovery, all filed 6/13/85. I submit that this was another departure from accepted judicial proceedings requiring this Court's supervision. Bloombury Mills v. Lewis, 608 F. 2d 971 (C.A. 4, 1979); John Simons Co. v. Grier Bros. Co., 258 U.S. 82; Burns v. Thiokol Chem. Corp., 483 F. 2d 300 (1973); Schwab v. Coleman, 145 F. 2d 672 (Cir. 4, 1944).

Moreover, mere technicalities of pleading should not be allowed to hinder a decision on the merits. Cooper v. Am. Employers' Ins. Co., 296 F. 2d 303, 306 (Cir. 6); Lone Star Motors v. Citroen Cars Corp., 288 F. 2d 69, 75 (Cir. 5); Retail Clerks Int'l v. Lion Dry Goods, 341 F. 2d 715, 722 (1965).

ARGUMENT X

The Appellate Court departed from the accepted and usual course of proceedings so as to require the exercise of this Court's power of supervision. It so departed in failing to acknowledge its jurisdiction of my appeals, especially since Defendants made pleading admissions of jurisdiction. The Defendants qualified their allegation of lack of subject matter jurisdiction throughout its motion to dismiss my F.R.A.P. Rule

4 (a) appeal, and memorandum in support of motion to dismiss all filed 11/13/85. This is seen in the memorandum's concluding paragraph qualifying the alleged lack of subject matter jurisdiction by issues "respectively" referred to before, that is to the denial of the temporary injunction and restraining order of August 3, 1983 and to the scheduling order of Jan. 4, 1985 "respectively."

In fact Plaintiff's appeals did not refer to that temporary injunction and restraining order and they did refer to the Jan. 4, 1985 scheduling order only in conjunction with the second scheduling order, of 7/29/85. Thus it effectively admits jurisdiction as to all other grounds of the appeals.

Defendants' motion to dismiss and memorandum in support of it filed 11/13/85 allege lack of subject matter jurisdiction under 28 U.S.C. 1292 (a) (1) re the first appeal at page 1 of the memorandum. Thus, it does not address my appeal as of right and its grounds, and therefore it must be taken to admit jurisdiction as to those grounds.

Appellees' brief filed 1/8/86 at p. 1, par. 3 qualifies their allegation of lack of subject matter jurisdiction, thereby admitting what was not qualified. They had already qualified their Rule 12 (b) (1) F.R.C.P. in their motion to dismiss and memorandum in support filed in the U.S. District Court on September 13, 1983, limiting it to failure to exhaust administrative remedies, abstention, and failure to state a claim. See argument VIII, supra.

Furthermore, the notice of appellees' brief filed 1/8/86 alleges a lack of subject matter jurisdiction Rule 12 (b) (1) F.R.C.P. re. the motion to convert motion to dismiss to plaintiff's motion for summary judgment only, at page 3 paragraph 2 which it argues is not proper since a motion to amend complaint had been submitted at the same time, and the same as to lack of subject matter jurisdiction of the scheduling order at page 5, par. 2; and offers another qualification at page 6, paragraph 1. This effectively admits jurisdiction as to the other appeal grounds and pleadings not so qualified.

ARGUMENT XI

The United States Court of Appeals for the Second Circuit is a leading exponent in finding a motion for summary judgement when warrented although no specific pleading may call it a motion for summary judgment. Thus, there was another serious departure here, when it failed to rule on Plaintiff's motion for summary judgment within his appeals and appellate brief in memorandum form.

This is especially so because Defendants moved out of time for an extension of time to file another brief, addressing the merits; and Defendants failed to submit any countervailing evidence with that brief. They thus effectively waived the right to present any countervailing evidence at a later time. Furthermore, Defendants have had more than ample opportunity to file evidence countervailing to Plaintiff's motions for summary judgment and motion to convert motion to dismiss into plaintiff's motion for sunimary judgment. Bagby v. U.S., 199 F 2d 233 (Cir. 8, 1952).

ARGUMENT XII

The Appellate Court made another serious departure in ruling contra F.R.A.P. Rule 28 (c) that Plaintiff reply brief of Dec. 6, 1985 was denied by the denial of his motion for extension of time to file that brief. The reason is that Plaintiff was entitled to that brief as a matter of right. That departure carried to the failure to accept the brief's arguments: that Defendants' motion to dismiss the F.R.A.P. Rule 4 (a) appeal and its memorandum of support filed 11/13/85 virtually admitted all of Plaintiff's grounds of appellate jurisdiction on his appeal as of right; and Defendants' brief filed 1/8/86 qualified its allegation of lack of subject matter jurisdiction to Plaintiff's motion to convert motion to dismiss to Plaintiff's motion for summary judgment, thus admitting jurisdiction re. his motions for summary judgment and other pleadings and grounds.

ARGUMENT XIII

The Appellate made another serious departure. The order granting Defendants extended time to file a brief was entered January 6, 1986, despite the fact that Defendants' motion out of time for the extension of time did not state reasons amounting to good cause, and despite the fact that I had mailed my opposition to that motion well before the grant of extended time. Defendants had asked until Jan. 6. 1986 to file this brief but filed it on Jan. 8, 1986.

Moreover, this was effectively Defendants second Brief, and they were entitled to just one in ordinary circumstances. Their first brief, I submit, was made up of their combination of motion to dismiss and motion in support of motion to dismiss. It was filed before their scheduled deadline.

ARGUMENT XIV

THERE IS AN IMPORTANT CONFLICT WHICH THIS Court should settle. The denial of my response of Dec. 6, 1985 to Defendants' reply without giving a reason for the denial conflits with this Court's decision and with that of the Sixth Circuit; Foman v. Davis 371 U.S. 178, 182; Retail Clerks Intl. v. Lion Dry Goods, Inc., 341 F. 2d 715, 722 (Cir. 6, 1965).

ARGUMENT XV

There is another serious departure in the Appelllate Court's dismissal of my case since an unfair timing sequence resulted from disrupted mail service during the holiday season. Thus, the Appellate Court scheduled oral argument for Jan. 20, 1986; Defendants' second, I submit, brief was filed Jan. 8; dismissal was filed Jan. 13; Notice of dismissal was received in the mail by me on Jan. 21; Plaintiff's response (to defendants' reply) against the extension of time and the second (I submit) brief was never ruled upon directly.

ARGUMENT XVI

Another serious Appellate Court departure resulted when the court failed to decide on Plaintiff's first suggestion for correction of the Record. All the necessary items but Defendants' motion for extension of time filed 8/12/83, and Defendants' letter of Jan. 31, 1985 consenting to an Amended Complaint, and Plaintiff's List of Exhibits number 1-22 filed 6/13/85, are physically in the record on appeal in Appellate Court. However, those items belong in there also. Moreover, the Index of the Record on appeal fails to list or number another 30 items that are physically in the record.

ARGUMENT XVII

Another serious departure from the usual Appellate Court proceedings occurred in its grant of dismissal for lack of subject matter jurisdiction over scheduling orders, despite the fact that Defendants' brief ("second brief") did not support this rationale of dismissal, but actually admitted subject matter jurisdiction.

Nor was the dismissal based on the lateness alleged in Defendants' motion to dismiss, because it did not state that it was. The dismissal was based on the non-appealability of scheduling orders under 28 U.S.C. 1292 (a) (1), which I have argued against supra in this petition.

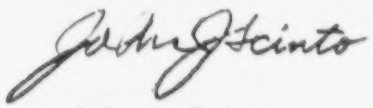
Nor can the Appellate Court, Sua Sponte, grant dismissal for lack of subject matter jurisdiction over this scheduling order because defendants admit jurisdiction, and that alone renders the rationale for lack of subject matter jurisdiction less than clear.

ARGUMENT XVIII

Another serious departure results from the Appellate Court's grant of dismissal though most of the cited cases in Defendants' ("second") brief are substantially distinguishable from the case at bar.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted.



John J. Scinto
Petitioner Pro Se
101 Mill River Drive
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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN SCINTO

v. CIVIL NO.N83-417

R. DAVID STAMM and
CONNECTICUT BAR EXAMINING COMMITTEE

ORDER

The parties shall file simultaneous supplemental memoranda of law on defendant's motion to dismiss by January 10, 1985. Any response memoranda shall be filed by January 16,1985. Oral argument on the motion to dismiss shall be heard on January 28, 1985, at 9:30 a.m. All discovery shall be suspended pending resolution of defendant's motion.

SO ORDERED.

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 3rd day of January, 1985.

Copies furnished to Stuart Glenn Rothenberg, Esquire.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN SCINTO

v. CIVIL NO. N83-417

R. DAVID STAMM, ET AL

SCHEDULING ORDER

The Court will address the defendants' amended motion to dismiss before addressing any other motions. This motion to dismiss will be treated as directed toward the document which has been given docket entry number 13 and appears to be captioned as the third amended complaint. The plaintiff shall file an opposition to the motion to dismiss on or before August 26, 1985. The defendant shall be permitted to file a response by September 3, 1985. The court will schedule oral argument thereafter if it feels such argument will be helpful in clarifying the issues presented by the parties. See Rule 9(a), Local Rules of Civil Procedure.

SO ORDERED.

/s/
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New haven, Connecticut, this 29th day of July, 1985.

Copies furnished to Stuart Glenn Rothberg, Esquire.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOHN J. SCINTO, PLAINTIFF PRO SE

VS. No. N 83 417(EBB)

R. DAVID STAMM, ET AL July 22, 1985

MOTION FOR DEFAULT JUDGMENT

Pursuant to Rule 55 plaintiff pro se respectfully requests the court to grant him a Default Judgment.

Defendants failed to answer plaintiff pro se's pleading of 7/28/83 within 20 days. Rule 12, F.R.C.P.

Defendants failed to answer plainfiff pro se's Complaint of 11/15/83.

Defendants failed to meet Judge Burns' order for filing supplemental memoranda by 1/10/85. Instead they obtained plaintiff pro se's agreement for an extension of time on the condition that defendants' attorney call the Court Clerk Mr. Arakas on 1/10/85. The attorney did not make the call, thus jeopardizing plaintiff pro se's opportunity

to comply with the order.

Defendants failed to contact plaintiff pro se for his agreement for an extension of time of the deadline for answering his Amended Complaint dated 4/21/85 and Court stamped 6/13/85. Local Rules of Civil Proc. Rule 9B.

I certify to the verification of these averments and stand ready to offer proof of them.

/s/ Plaintiff pro se
John J. Scinto

Copies furnished to Stuart Glenn Rothenberg, Esquire.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOHN J. SCINTO

VS. DOC. NO. 85-7732

R. DAVID STAMM, ET AL

NOTICE OF MOTION

for Leave to file motion out of time and motion for an extension of time to file the appellees' brief

MOTION BY:

Stuart Glenn Rothenberg, Esq.

(203) 643-2726

LaBelle, Rothenberg & LaBelle, P.C.

OPPOSING COUNSEL:

John J. Scinto, pro se

(203) 375-8596

Has consent of opposing counsel:

A. been sought? No

B. been obtained? No

Has service been effected? Yes

Is oral argument desired? No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? Yes

B. by firm date of argument notice? No

C. If Yes, enter date:_____

Judge or agency whose order is being appealed:

United States District Court - D Conn

Judge Burns

Brief statement of the relief requested:

Request for order granting leave to file appeals brief.

By: /Signature of attorney/
Stuart Glenn Rothenberg

Appearing for: R. David Stamm

Appellee-Defendant

Date 12/19/85

ORDER

IT IS HEREBY ORDERED that the motion for extension of time is granted only to the extent that the record on appeal shall be

filed on or before 1986; the appellant's brief and joint appendix shall be filed on or before 1986; the appellee's brief shall be filed on or before January 10, 1986; and the appeal shall be ready to be heard as early as the week of January 20, 1986.

1/6/86
Date

ELAINE B. GOLDSMITH, Clerk

By: /s/
Eileen Shapiro
Senior Staff Attorney

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of January, one thousand nine hundred and eighty six.

John J. Scinto

85-7732

v.

R. David Stamm, et al

A motion having been made herein by appellant pro se to correct the district court docket sheet and for an extension of time to file a brief.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

/s/
WILFRED FEINBERG, Chief Judge

/s/
ELLSWORTH A. VAN GRAAFEILAND

/s/
RALPH K. WINTER, Circuit Judges

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of January, one thousand nine hundred and eighty six.

John J. Scinto

85-7732

v.

R. David Stamm, et al

A motion having been made herein by appellee to dismiss the appeal for failure to file proper notice as provided by Fed. R. App. P. 5(a); for failure to file proper notice as provided by Fed. R. App. P. 4(a); for lack of subject jurisdiction under 28 U.S.C. 1292(a)(1).

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted for lack of subject matter jurisdiction. A scheduling order is not appealable under 28 U.S.C. 1292(a)(1).

/s/
WILFRED FEINBERG, Chief Judge

/s/
ELLSWORTH A. VAN GRAAFEILAND

/s/
RALPH K. WINTER, Circuit Judges